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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6779

WALTER LITTLE,
Appellant,

v.

GLORIA STREATER,
Appellee.

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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v.

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ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

The appellant, Walter Little, appeals from a final judgment of the Appellate Session of the Superior Court of Connecticut, entered April 1, 1980, holding that Conn.Gen.Stat. §46b-168 (1979), which requires all defendants in paternity proceedings, irrespective of means, to pay for blood grouping tests in advance of trial, does not, as applied in this case, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut, dated February 29, 1980, which appears at p. 1a of the Appendix hereto, is unreported. The April 1, 1980 Order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756 (1980) and appears at p. 3a of the

Appendix. No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

This appeal involves a proceeding, brought by the appellee pursuant to Conn.Gen.Stat. §46b-160 (1979), to establish the paternity of a child born out of lawful wedlock.

The judgment of the Appellate Session of the Superior Court of Connecticut, affirming the judgment of the trial court that appellant was the father of the child in question in spite of the fact that the trial court denied appellant's motion, based on his indigency, that the cost of a blood grouping test be paid by the State of Connecticut, was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p. 4a of the Appendix hereto, was duly filed in the Appellate Session of the Superior Court of Connecticut on June 3, 1980.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2), the validity of Conn.Gen.Stat. §46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

CASES BELIEVED TO SUSTAIN THE JURISDICTION

The Appellate Session of the Superior Court of Connecticut explicitly viewed this case as drawing the validity of Conn.Gen. Stat. §46b-168 (1979), as applied in this case, into question and decided in favor of the statute's validity. See pp. 1a-2a of the Appendix hereto. For reasons discussed at pp.5-6 infra, although appellant raised his underlying constitutional claims at the earliest stage of the trial proceeding, the validity of the statute was first raised on appeal to the Appellate Session.

This Court has consistently held that there can be no question as to the proper presentation of a federal claim when the highest state court actually passes on it. See Boykin v. Alabama, 395 U.S. 238, 241-42 (1969); Coleman v. Alabama, 377 U.S. 129 (1964); Raley v. Ohio, 360 U.S. 423, 436-37 (1959); Whitney v. California, 274 U.S. 357, 360-63 (1927).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the validity of Conn.Gen.Stat. §46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissable in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

This case also involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

In a paternity proceeding that the State of Connecticut caused to be instituted by a recipient of public assistance against an indigent, incarcerated defendant, does Conn.Gen.Stat. §46b-168 (1979) violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when applied to deny the use of blood grouping tests to the defendant solely because of his indigency?

STATEMENT OF THE CASE

The appellee, Gloria Streater, instituted this paternity proceeding on July 11, 1977, in what was then termed the

Court of Common Pleas,[1] Geographical Area No.6, in New Haven, Connecticut (R.4).[2] She sought a judgment that the appellant, Walter Little, was the father of a female child, Kenyatta Chantel Streater, to whom she gave birth on May 21, 1975. At the time this action was instituted, appellee was a recipient of public assistance. As a requirement of continuing eligibility for such assistance, she was compelled to disclose the name of the putative father of her child to the Connecticut Department of Income Maintenance (Transcript of September 28, 1978, at 5-6). See Conn.Gen.Stat. §46b-169(1979). That agency then referred the instant case to her attorney for prosecution (R.29).

At the time this action was instituted, appellant was incarcerated in the Connecticut Correctional Institution, Enfield (Transcript of September 28, 1978, at 11). As a result of his incarceration he was indigent.[3] He consequently filed a Motion For Blood Grouping Test In Forma Pauperis on November 28, 1977 (R.8-11A). This Motion recited the facts of his indigency and requested a court order requiring appellee and her child to submit to a blood grouping test and a further order that the cost of such test be paid by the State of Connecticut.

1/ The Connecticut Court of Common Pleas was merged with the Superior Court of Connecticut on July 1, 1978, while this case was awaiting trial, pursuant to 1976 Conn.Pub.Acts No. 76-436§1.

2/ The record before the Appellate Session of the Superior Court of Connecticut consisted of a Record of various documents filed in the action, cited herein as "R.," and separately bound transcripts of proceedings in the trial court on December 5, 1977, and September 28, 1978.

3/ The trial court later specifically found appellant to be indigent. See Finding 8 (in an unpaginated portion of the Record).

On December 5, 1977, however, this Motion was denied by the Court to the extent that it requested that the cost of such tests be paid by the State (R.1).

The paternity action itself was tried before the Court[4/] on September 28, 1978. Appellant was still incarcerated at the time of trial and had been unable to afford a blood grouping test. Consequently, no such test was ever taken (Transcript of September 28, 1978, at 2). After the trial, on October 4, 1978, the Court entered an order finding that appellant was the father of the child in question (R.2).

At a hearing in damages, on October 16, 1978, the Court found appellant liable for a total of $6,974.48 for maintenance and support of the child in question and attorney's fees, payable to the Connecticut Department of Finance and Control (R.38-39).

The appellant appealed on the issue of whether the trial court erred in denying his Motion that the cost of a blood grouping test be paid by the State. On February 29, 1980, the Appellate Session of the Superior Court found no error. The Supreme Court of Connecticut denied certification on April 1, 1980.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

At the earliest stage of the proceedings below, the appellant raised the claim, in his Motion For Blood Grouping Test In Forma Pauperis, that the denial of an opportunity to obtain a blood grouping test because of his indigency "would deprive him of property without due process of law and deny to him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States" (R.9). At this time, Conn.Gen.Stat. §46b-168 (1979), had not been construed as requiring the costs of blood grouping tests to be charged to the

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4/ It is settled law in Connecticut that defendants in paternity proceedings, irrespective of means, may obtain jury trials only upon payment of a fee. Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824, cert. denied, 429 U.S. 852 (1976).

party moving for the tests irrespective of his means. Since the statute was not considered as controlling by the trial court or either of the parties[5/] there was no occasion at the trial level to draw its validity into question. The trial court's denial of appellant's Motion that the costs of blood grouping tests be paid by the State, however, plainly constituted a rejection of his constitutional claims.[6/]

Appellant appealed to the Appellate Session of the Superior Court of Connecticut, reiterating his consitutional claims in his Assignment of Errors. While the instant case was on appeal, however, the Appellate Session rendered its decision in Ferro v. Morgan, 35 Conn.Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979). Ferro, for the first time, construed Conn Gen.Stat. §46b-168 (1979) as mandating that the costs of blood grouping tests in paternity cases be charged to the party moving for such tests, irrespective of his means,and upheld the constitutionality of this newly enunciated statutory requirement.

The Appellate Session considered appellant's constitutional claims in the instant case in the light of its intervening decision in Ferro v. Morgan. It explicitly considered those claims as drawing the constitutionality of §46b-168 into question. The first sentence of its short per curiam opinion expressly states that "This case presents ... the question of whether in a paternity proceeding General Statutes §46b-168 ... violates the due process and equal protection rights of an indigent

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5/ Conn.Gen.Stat. §46b-168 (1979) was not mentioned by the Court or either party during the hearing on appellant's Motion. Transcript of December 5, 1977.

6/ In Finding 13 (in an unpaginated portion of the Record), the trial court expressly "concluded" that the denial of a blood grouping test to an indigent defendant in a paternity action did not violate the Fourteenth Amendment to the Constitution of the United States.

defendant in such a proceeding." P.1a, infra. The Appellate Session expressly concluded that the statute does not violate these rights. In doing so, it plainly satisfied the jurisdictional requirements of 28 U.S.C. §1257 (2). The Supreme Court of Connecticut denied certification.

THE QUESTION IS SUBSTANTIAL

The most dramatic indicium of the substantial nature of the question presented by this appeal is the almost total isolation of Connecticut law on the issue of blood tests in paternity proceedings involving indigent defendants. Connecticut is one of just two states that statutorily require all defendants in paternity cases, irrespective of means, to pay for a blood test in advance of trial.[7/] Of the numerous judicial decisions

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7/ Connecticut and North Carolina are the only states that statutorily require the party requesting a blood test to pay for that test in advance. Conn.Gen.Stat. §46b-168(1979); N.C. Gen.Stat. §8-50.1 (Supp. 1979).

In contrast, twenty-four states and the District of Columbia expressly allow the costs of such tests to be charged to the State, county, municipality, or a public agency. Of these, eighteen states and the District of Columbia do so by statute. Ala. Code tit. 26§12-5 (1977); Ark. Stat. Ann. §34-705.1 (1962); Cal. Evid. Code §894 (Deering 1966), see Michael B. v. Superior Court, 86 Cal. App.3d 1006, 150 Cal.Rptr. 586 (1978); Haw. Rev. Stat. §584-16 (1976); Idaho Code §7-1117 (1979); Ill. Rev. Stat. ch.106 3/4 §3 (Supp. 1979); Kan. Stat. §23-132 (1974)(the fees are subsequently taxed as costs); La. Rev. Stat. Ann. §9:397.1 (West Supp. 1980); Md. Ann.Code art.16 §66G (Supp. 1979); Mich. Stat. Ann. §25.496 (c) (1974); N.H. Rev. Stat. Ann. §522.3 (1974); N.Y. Fam. Ct. Act §532 (McKinney Supp. 1976-79), see People ex rel. Van Epps v. Doherty, 261 App. Div. 86, 24 N.Y.S. 2d 821 (1941); N.D. Cent. Code §14-17-15 (Supp. 1977); Or. Rev. Stat. §109.256 (1979); 42 Pa. Cons. Stat. Ann. §6132 (Purdon Supp. 1979); Tex. Fam. Code Ann. §13.03 (Vernon Supp. 1980) (if the Texas Department of Human Resources "is a party of the suit"); Utah Code Ann. §78-25-23 (1977); Wis. Stat. Ann. §52.36 (2) (West Supp. 1979-80)(the fees are subsequently taxed as costs); 16 D.C. Code §2343 (1973). The Supreme Courts of Colorado, Massachusetts, and West Virginia have held payment by the State to be constitutionally required. Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977), Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969); Graves v. Daugherty, No. 14517 (W.Va. May 13, 1980). Such tests are judicially charged to the State in New Jersey by the inherent power of the courts in that State. Smith v. Walker, 138 N.J.Super. 187, 350 A.2d 319 (1975). Such tests are charged to the State in Kentucky by virtue of Ky. Op. Att'y Gen. 65-391. In Indiana, it is the

that have considered the constitutionality of this practice,

7/ continued

policy of the Department of Public Welfare to pay for blood tests where the prosecuting attorney requests such a test or where the parties stipulate that the test results will be admitted into evidence. Letter from Thomas W. McKean, Director, Indiana Child Support Division, Department of Public Welfare to IV-D Deputy Prosecuting Attorneys (December 4, 1979)(unpublished letter on file in the office of appellant's attorney).

In addition, the statutes of five states give the courts of those states unlimited power to determine how and by whom such costs shall be paid. Me. Rev. Stat. tit. 19§279 (Supp. 1979-80); Miss. Code Ann. §93-9-25 (1972); Nev. Rev. Stat. §56.020 (1979); Ohio Rev. Code Ann. §3111.16 (Baldwin 1976); R.I. Gen. Laws §15-8-13 (Supp. 1979). These statutes clearly provide local courts with the necessary authority to order that such costs be paid by the state where one or both of the parties are indigent. Ohio courts have not, however, been in agreement on whether that state should be charged in cases involving indigent defendants. Compare Walker v. Stokes, 45 Ohio App.2d 275, 344 N.E.2d 159 (1975)(holding such payment to be constitutionally required) with Bigsby v. Bates, 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978)(holding free blood tests not required in light of Walker v. Stokes, 54 Ohio App.2d 119, 375 N.E.2d 1258 (1977)(stripping state of its power to jail for nonsupport)).

Somewhat more ambiguously, the statutes of five more states simply provide that local courts "may" in their discretion, order such costs to be paid by the parties. 1980 Ga. Laws No.1331 §1 (to be codified as Ga. Code §74-311)(effective July 1, 1980); Tenn. Code Ann. §24-716 (Supp. 1979); Va. Code §20-61.2 (Supp. 1979); Wash. Rev. Code Ann. §26.26.140 (Supp. 1980-81); Wyo. Stat. §14-2-114 (1978). These statutes appear to provide local courts with at least some authority to charge such costs to the state where one or both of the parties are indigent.

Although the relevant statutes in Minnesota are unclear, courts in that state would, in all probability, order such payment by virtue of Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979)(giving indigent putative fathers the right to a free attorney). The laws of the remaining thirteen states (Alaska, Arizona, Delaware, Florida, Iowa, Missouri, Montana, Nebraska, New Mexico, Oklahoma, South Carolina, South Dakota, and Vermont) are simply unclear.

moreover, those of the Appellate Session of the Superior Court of Connecticut are, with a single exception involving an idiosyncratic Ohio law, the only ones upholding it.[8/] Thus, the

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8/ The Appellate Session of the Superior Court of Connecticut has held that the state is not constitutionally required to provide blood tests to indigent putative fathers in three decisions: Ferro v. Morgan, 35 Conn. Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979), Knox v. Siddell, No.734 (Conn. App. Sess. Super. Ct. March 16, 1979); and the instant case. In contrast, courts have held that the state is constitutionally required to provide such tests in Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969); Lascaris v. Lardeo, 100 Misc.2d 220, 417 N.Y.S.2d 665 (Fam. Ct. 1979); Walker v. Stokes, 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); and Graves v. Daugherty, No. 14517 (W.Va. May 13, 1980). See Madeline G. v. David R., 95 Misc. 2d 273, 407 N.Y.S.2d 414 (Fam. Ct. 1978)(giving indigent putative fathers the constitutional right to counsel at no cost). Cf. M.v.S., 169 N.J. Super. 209, 404 A.2d 653 (1979); Lurry v. Mills, 152 N.J. Super. 127, 377 A.2d 804 (1977); Smith v. Walker, 138 N.J. Super. 187, 350 A.2d 319 (1975)(giving indigent putative fathers the right to a blood test by virtue of the inherent powers of the New Jersey Courts but drawing extensively on constitutional precedent and reasoning.

The single exception to this unbroken line of cases in other states is Bigsby v. Bates, 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978), holding that free blood test are not required in Ohio in light of Walker v. Stokes, 54 Ohio App. 2d 119, 375 N.E. 2d 1258 (1977)(stripping Ohio of its power to jail for nonsupport). Because Bigsby is merely a memorandum of a single trial judge its authority is limited even in Ohio. It plainly has no relevance to states such as Connecticut which retain full power to jail for nonsupport. See Conn.Gen.Stat. §§46b-215, 53-304 (1979).

issue in the instant case does not merely involve a direct conflict among state appellate courts, although the decision of the Appellate Session below is in obvious conflict with such cases as Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977), and Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969). Rather, from the objective evidence of the country's present judgment concerning the provision of blood tests to indigent defendants in paternity cases, see nn. 7 & 8 supra, this is an appeal from a decision that is well outside the mainstream of American jurisprudence.

Appellant's principal claim is that, given the distinctive nature of paternity proceedings and the remarkable effectiveness with which modern blood tests conclusively exonerate falsely accused defendants in such proceedings, the denial of a blood test to a putative father solely because of his indigency is the denial of a fundamental constitutional right. While this is a preposition in which a clear majority of American courts and legislatures concur, the question is a novel and substantial one before this Court. It is of particular importance because it stands at the juncture of two lines of constitutional precedent - one line of cases dealing with the rights of civil plaintiffs, see Boddie v. Connecticut, 401 U.S. 371 (1971), and the other with the rights of criminal defendants, see Griffin v. Illinois, 351 U.S. 12 (1956).

The constitutional rights of indigent civil defendants, particularly in proceedings involving family rights and potential future criminal sanctions, have not been directly addressed by this Court. It was presumably to consider this hitherto disregarded middle category that the Court granted certiorari earlier this term in In re Subler, 100 S.Ct. 262 (1979), to consider the question, "Does dismissal of appeal as

of right caused by denial of free transcript and court appointed attorney for 'ndigent mother seeking to appeal order permanently terminating parental custody violate Due Process and Equal Protection Clauses?" 48 U.S.L.W. 3316 (U.S. Nov. 6, 1979)(No. 79-5215). The Court, however, subsequently remanded Subler to the Ohio Court of Appeals for further consideration in light of State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980), see 100 S.Ct. 1003 (1980), leaving the fundamental constitutional questions involved unresolved by this Court. The instant case now presents these fundamental questions in a particularly compelling context. When the merits of the question presented are considered, the dramatic isolation of Connecticut law becomes readily understandable.

This Court held in Boddie v. Connecticut, supra, 401 U.S. at 377, "that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." A recent scientific "revolution"[9/] in the use of blood group systems in cases of disputed paternity has rendered the use of blood tests an absolutely essential component of "a meaningful opportunity to be heard" in paternity proceedings. Standard blood tests can now readily exclude,at a reasonable cost, 91% of falsely accused putative fathers, in the case of blacks, and 93% in the case of whites. Krause, Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage, 10 Fam. L. Q. 247, 258 Table 3 (1976). See Hepfel v. Bashaw, 279 N.W. 2d 342, 347 (Minn. 1979); State ex rel. Ortloff v. Hanson, 277 N.W. 2d 205, 207 (Minn. 1979); Lascaris v. Lardeo, 100 Misc. 2d 220, 222, 417 N.Y.S.2d 665, 666 (1979).

9/ Terasaki, Resolution By HLA Testing Of 1000 Paternity Cases Not Excluded By ABO Testing, 16 J. Fam. L. 543, 543 (1978). The revolution involves the introduction of the HLA - standing for human, leukocyte (white blood cell), antigen - system of testing. For a discussion of the basic principles of HLA testing see Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Terasaki, supra.

Where a standardized, universally recognized laboratory test, that conclusively establishes nonpaternity in more than 90% of all cases involving falsely accused defendants is readily available, the denial of that test to indigent defendants is the denial of "a meaningful opportunity to be heard." Without it, the indigent defendant is placed in a swearing contest with the plaintiff[10/] in which a judge[11/] must, often desperately, rely on his subjective instincts, rather than hard scientific data, as to which witness is telling the truth. "[A]bsent a countervailing state interest of overriding significance," this denial of an effective defense is a denial of due process as surely as was the denial of access to divorce court in Boddie. Here, as in Boddie, the State's only legitimate countervailing interest is "resource allocation or cost recoupment." 401 U.S. at 382. This justification was offered and rejected in Boddie. It is, if anything, even less convincing here, where, as discussed infra, the State is aggressively using the judicial system to gain monetary judgments from indigent defendants. This justification should be rejected.

This basic constitutional requirement is unaffected by United States v. Kras, 409 U.S. 434 (1973)(refusing to waive filing fees to an indigent petitioner in bankruptcy), and Ortwein v. Schwab, 410 U.S. 656 (1973)(refusing to waive filing

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10/ In Connecticut, moreover, this swearing contest is one that is heavily biased in favor of the plaintiff. See the discussion of Connecticut paternity law at pp.16-17, infra.

11/ Not, in Connecticut, a jury. See n.4 supra.

fees to an indigent wishing to appeal a denial of welfare benefits), for a number of reasons. These reasons involve both the obvious fact that the petitioners in those actions were plaintiffs, who have not been forced into the judicial process to resolve their difficulties, and certain distinctive features of paternity proceedings. These factors are enumerated below. Taken together, they implicate a variety of constitutional rights that are at least as fundamental as those involved in Boddie and are arguably even more basic to our constitutional system.

First. This action involves the denial of an essential item of evidence to a defendant. The appellant here did not choose to file a legal action as one of several available paths to relief. Rather, he was summoned to court against his will by the appellee. Boddie turned, in large part, on the fact that the plaintiffs in that case were compelled to go to court to resolve their difficulties. See United States v. Kras, supra, 409 U.S. at 445. That factor is surely present here. In fact, in the respect that his presence in court is wholly involuntary, appellant stands in exactly the same position as a defendant in a criminal action.

Second. In Connecticut, as in most states, a losing defendant in a paternity proceeding becomes subject to a number of potential criminal and quasi-criminal sanctions not present in the ordinary civil case.[12/] The appellant here has, of course, already been found liable for thousands of dollars in support payments and is obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215 (a) (1979). Should he subsequently fail to comply with any

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12/ The perhaps unparalleled absence of such sanctions in Ohio was the basis of Bigsby v. Bates, discussed in n.8 supra.

support order he will be subject to imprisonment for contempt of court. Id. He will further be subject to criminal prosecution and imprisonment for nonsupport. Conn.Gen.Stat. §53-304 (1979). Thus, his liberty, as well as property, interests are plainly implicated by the paternity proceeding that is the subject of this appeal.[13/]

Third. Although the instant case is nominally a private affair, it is in fact a case in which the full power of the State has been brought against an indigent defendant in a judicial proceeding. The State, of course, lurks in the background of every paternity proceeding in Connecticut by virute of the potential criminal and contempt sanctions discussed supra. But, in the instant case, the State is much more directly involved. Because the appellee is a recipient of public assistance, she was compelled to disclose the name of the putative father of her child to the Connecticut Department of Income Maintenance. Conn.Gen.Stat. §46b-169 (1979). That state agency then referred the instant case to her attorney for prosecution (R.29). The state not only paid appellee's attorney to prosecute the appellant, but is the actual recipient of the several thousand dollars of support money awarded by the trial court (R.38-39).[14/] Moreover, as a practical matter, the appellant in this case was necessarily rendered indigent by his incarceration by the State. The State was thus involved in the practical aspects of the litigation below in almost every conceivable way.

As this Court has stated in a somewhat different context, "Conduct that is formally 'private' may become so entwined with

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13/ Although the Supreme Court of Connecticut has chracterized paternity proceedings as "civil" rather than "criminal" in Robertson v. Apuzzo, n.4 supra, such an adroit act of pigeonholing in no way erases either the existence of the criminal and quasi-criminal sanctions discussed in the text or the fact that these sanctions are not involved in the ordinary civil case. It is, of course, implicit in our entire argument that paternity proceedings are demonstrably different from garden-variety civil litigation and that the civil/criminal distinction is therefore hardly talismanic.

14/ This procedure is required by 42 U.S.C. §654(4). See 45 C.F.R.§232.12 (1979).

governmental policies or so impregnated with a governmental chracter as to become subject to the constitutional limitations placed upon state action ." Evans v. Newton, 382 U.S. 296, 299 (1966). See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Such "state action" permeated the entire proceeding in the instant case. Because of this undeniable fact, the legal actions of the appellee, ostensibly a private citizen, were essentially the actions of the State for purposes of the Fourteenth Amendment.[15/]

The three factors of involuntariness, potential criminal sanctions, and state action, taken together, strongly indicate that a celebrated line of this Court's decisions, involving the rights of indigent criminal defendants, is applicable to the instant case. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment compels a State to furnish a state-paid transcript of his criminal trial to an indigent criminal defendant on appeal. Noting the disparity between the ability of indigent and non-indigent defendants to obtain adequate appellate review under then-existing practice, a plurality of the Court decided the case on the broad ground that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19 (plurality opinion of Mr. Justice Black). Following Griffin, the Court required the provision of appointed counsel on an appeal as of right from a criminal conviction in Douglas v. California, 372 U.S. 353 (1963). The principle of these cases has been extended to matters needed for pretrial preparation, see Britt v. North Carolina, 404 U.S. 226 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967), and, of particular

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15/ See Madeline G. v. David R., 95 Misc. 2d 273, 275-76, 407 N.Y.S.2d 414, 416 (Fam.Ct. 1978).

relevance to this appeal, even to a case involving a mere $250 fine, see Mayer v. City of Chicago , 404 U.S. 189 (1971).

While criminal defendants stand on a particularly exalted constitutional plane for obvious reasons, the underlying principles involved in the Griffin-Roberts-Britt-Mayer line of cases are plainly relevant to the instant case. Here, as in those cases, the full power of the State has been brought against an indigent defendant in a judicial proceeding. And here, as in those cases, the defendant, because of his indigence, has been deprived of a necessary means of presenting his case. Under these circumstances, "The balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973), is so disproportionate as to smack of fundamental unfairness.

In addition to the three factors of involuntariness, potential criminal sanctions, and state action that analogize the instant case to Griffin and its progeny, certain other factors exist that further distinguish the instant case from United States v. Kras, supra, and Ortwein v. Schwab, supra. These factors involve the distinctive nature of paternity proceedings. Considered in conjunction with the forgoing factors, they leave no doubt that Conn.Gen.Stat. §46b-168 (1979), as applied in this case, is inconsistent with the dictates of the Fourteenth Amendment.

Fourth. In Connecticut, a defendant in a paternity proceeding must bear a unique evidentiary burden. Since the enactment of Connecticut's original Bastardy statute in 1672,plaintiffs and defendants in paternity actions have been placed in dramatically unequal positions. Under the original statute, "the man charged by the Woman to be the Father, she holding constant in it" was deemed to "be the reputed Father" and, ipso facto, "liable to the charge of maintenance...notwithstanding his denyal."[16/] Despite several intervening statu-

16/ See The Book of the General Laws for the People within the Jurisdiction of Connecticut 6 (1673).

tory changes, the Connecticut Supreme Court held in Booth v. Hart, 47 Conn. 480, 485 (1876), that once the plaintiff in a paternity proceeding has established a prima facie case, "the burden of proof then changed to the defendant, and he was required to prove himself innocent of the accusation by other evidence than his own." (Emphasis added.) This rule was reaffirmed in Mosher v. Bennett, 108 Conn. 671, 674, 144 A. 297, 298 (1929). Under this rule, a defenant's own testimony, regardless of his credibility, is legally insufficient to outweigh the plaintiff's testimony in the pans of justice. See Kelsaw v. Green, 6 Conn. Cir. Ct. 516, 276 A.2d 909 (App. Div. Cir. Ct. 1971). Given this evidentiary requirement, a blood grouping test is even more important to the defendant than it would otherwise be, and the balance of forces in a proceeding against an indigent becomes egregiously unfair.

Fifth. Paternity proceedings by their nature involve the family rights of unwed father, a right that this court is increasingly recognizing as significance. See Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972). This case, to be sure, is in many ways the converse of Caban and Stanley. The fathers in those cases were attempting to assert their parental rights, while the appellant here denies that he is, in fact, a parent. But the fundamental rights of parentage are nevertheless involved, for as a result of this paternity action both appellant and the child in question have been saddled with a parent-child relationship. The State's only interest in initiating this proceeding was, of course, financial, but a binding determination of parentage ineluctably carries with it a host of legal, moral, and emotional consequences that perhaps cannot even be forseen at the present time. Under these circumstances, it is in the interest of all parties and society as well that, if a parent-child relationship exists,

its existence be determined accurately. To deny a defendant an accurate determination of his paternity solely because of his poverty "needlessly risks running roughshod over the important interests of both parent and child." Stanley v. Illinois, supra, 405 U.S. at 657. Such a denial is inconsistent with the fundamental requirements of the Fourteenth Amendment.

Finally. Given the factors discussed supra, the ultimate result of Connecticut's blood test law is to create a particularly egregious dual system of justice that has a substantial, adverse, and recurring impact on a significant number of defendants in paternity proceedings.[17/] Because of the extraordinary frequency with which modern blood grouping tests conclusively exclude falsely accused putative fathers there is, needless to say, no question that nonindigent defendants who dispute their paternity will utilize these tests. In return for the payment of a modest laboratory fee, a falsely accused nonindigent defendant is overwhelmingly likely to obtain a swift, scientific, and absolutely unimpeachable exoneration. The indigent defendant, on the other hand is placed in a swearing contest with the plaintiff in which the pans of justice are loaded against him. In such a contest even the fairest and most conscientious judge can rarely claim that he has rendered a decision not open to doubt. There are, consequently, two dramatically different systems of justice: a reliable one for defendants with assets and an unreliable one for the poor. The observation of Mr. Justice Frankfurter in his concurring opinion in Griffin v. Illinois, supra, 351 U.S. at 23-24, is particularly appropriate to this state of affairs:

17/ Although it may seem anomalous that scarce legal resources are regularly exmployed to institute suits for money judgments against indigent defendants, this result could hardly be otherwise in a state which is compelled to initiate paternity actions in behalf of mothers receiving public assistance. See n.14, supra, and accompanying text. It is unlikely that such recipients will have intimately associated with people of means.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

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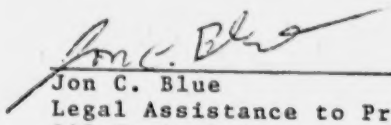
The State is not free to produce such a squalid discrimination.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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June 12, 1980

APPENDIX

APPELLATE SESSION OF THE SUPERIOR COURT

December, 1979, at Hartford

A.S. 806

GLORIA STREATER v. WALTER LITTLE

Argued: December 19, 1979 Decided: February 29, 198

Paternity action brought to the Court of Common Pleas in New Haven County where the court, Melville, J., granted the defendant's motion for a blood grouping test but ordered the cost of such test not to be paid by the state; the court, Schaller, J., adjudged the defendant to be the father of the plaintiff's minor child and the defendant appeals. No error.

Jon C. Blue, for the appellant (defendant).

Stephen J. McGovern, assistant attorney general, for the appellee (state).

PER CURIAM. This case presents for the third time before this court the question of whether in a paternity proceeding General Statutes § 46b-168, which makes the costs of blood grouping tests chargeable against the party moving for such tests, violates the due process and equal protection rights of an indigent defendant in such a proceeding. In Ferro v. Morgan, 35 Conn. Sup. 689, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979), we addressed and specifically rejected these constitutional claims. In Knox v. Siddell, Conn. Sup. (App. Sess. No.734, Decided March 16, 1979), we again considered these claims

and as an alternative ground ruled that our decision was controlled by Ferro v. Morgan, supra. No new arguments or authorities have been presented to us in this case which would persuade us to come to a different result.

There is no error.

PARSKEY, D. SHEA and BIELUCH, Js., participated in this decision.

Date of Judgment - February 29, 1980
Counsel Notified - February 29, 1980

Alfred J. Graziolo
Assistant Clerk -
Appellate

PEDIMENT HOMES, INC. *v.* FLOYD RUSSELL ET AL.

The plaintiff's petition for certification for appeal from the Appellate Session of the Superior Court is granted by the court.

Stephen C. Gallagher, in support of the petition.
David P. Ball, in opposition.

Decided April 1, 1980

180 *Conn.* 756

KERMIT ADAMS, TRUSTEE, ET AL. *v.* PLANNING COMMISSION OF THE TOWN OF BETHLEHEM

The defendant's petition for certification for appeal from the Superior Court in the judicial district of Waterbury is denied by the court.

David B. Losee, in support of the petition.
James R. Healey, in opposition.

Decided April 1, 1980

WILLIAM CIBES ET AL. *v.* STATE TRAFFIC COMMISSION ET AL.

The plaintiffs' petition for certification for appeal from the Superior Court in the judicial district of New London is denied by the court.

Timothy D. Bates and *Myron B. Bell*, in support of the petition.

Frank Rogers, assistant attorney general, and *Elizabeth R. Collins*, in opposition.

Decided April 1, 1980

GLORIA STREATER *v.* WALTER LITTLE

The defendant's petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Jon C. Blue, in support of the petition.

Stephen J. McGovern, assistant attorney general, in opposition.

Decided April 1, 1980

180 *Conn.* 757

CHRISTINE S. KUEHN *v.* BRIDGEPORT HOSPITAL ET AL.

The defendants' petition for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Paul E. Pollock, in support of the petition.
Frederick J. Martin, in opposition.

Decided April 2, 1980

JAMES E. SMITH *v.* ZONING BOARD OF APPEALS OF THE CITY OF MILFORD ET AL.

The petition of New Haven Bird Club, Inc., for certification for appeal from the Superior Court in the judicial district of Ansonia-Milford is denied by the court.

Daniel Millstone, in support of the petition.

Decided April 2, 1980

STATE OF CONNECTICUT *v.* NICHOLAS ROMANO

The defendant's petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Nicholas Romano, pro se, in support of the petition.

Decided April 15, 1980

LAWRENCE MATTO ET AL. *v.* FRANK R. CARDASSI ET AL.

The defendants' petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Robert W. Lotty, in support of the petition.

Decided April 15, 1980

180 *Conn.* 758

BETHEL ASSEMBLY OF GOD, INC. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF TRUMBULL

The petition of William W. Joslin et al. for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Harold Sobel, in support of the petition.
Gary W. Nicholson, in opposition.

Decided April 29, 1980

HERBERT A. JOHNSON ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF TRUMBULL ET AL.

The plaintiffs' petition for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Raymond W. Beckwith, in support of the petition.
Stewart I. Edelstein and *Burton S. Yaffie*, in opposition.

Decided April 29, 1980